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 UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CRIM. CASE NO. 08CR0016-DMS
)	
Plaintiff,)	DATE: March 7, 2008
)	TIME: 11:00 a.m.
)	
v.)	GOVERNMENT'S RESPONSE IN OPPOSITION TO
)	DEFENDANT'S MOTION TO:
)	(1) COMPEL DISCOVERY AND PRESERVE
)	EVIDENCE; AND
JOEL JIMENEZ-POLANCO,)	(2) GRANT LEAVE TO FILE FURTHER
)	MOTIONS
)	
Defendant.)	
)	
)	

COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Luella M. Caldito, Assistant United States Attorney, and hereby files its Response in Opposition to Defendant's above-referenced Motions. This Response is based upon the files and records of this case.

I

STATEMENT OF THE CASE

On August 27, 2007, a federal grand jury in the Southern District of California returned an Indictment charging Joel Jimenez-Polanco ("Defendant") with Deported Alien Found In the United

1 States, in violation of Title 8, United States Code, Section 1326 (a) and (b). The Indictment further
2 alleged that Defendant had been removed from the United States subsequent to May 4, 2005.

3 II

4 STATEMENT OF FACTS

5 A. THE INSTANT OFFENSE

6 On August 26, 2007, at approximately 9:20 p.m., Supervisory Border Patrol Scott Zimmer
7 responded to a seismic sensor activation in an area approximately eight miles west and four miles north
8 of the Tecate, California Port of Entry. As Agent Zimmer was following footprints north on a trail,
9 he heard the rustling of nearby bushes. When Agent Zimmer approached the bushes, several people
10 jumped up and began to run away. Agent Zimmer identified himself as a Border Patrol agent and
11 began chasing the fleeing people. Senior Patrol Agent James Garcia arrived on the scene to assist
12 Agent Zimmer. With the help of a Border Patrol helicopter and after an extensive foot chase, Agent
13 James apprehended two individuals, including Defendant. Agent Garcia conducted a field immigration
14 interview of both individuals. Defendant admitted that he was a citizen of Mexico and did not possess
15 any valid immigration documents that would allow him to legally enter or remain in the United States.
16 Defendant was arrested and transported to the State Route 94 Checkpoint for further processing.

17 Defendant's fingerprints were entered into record checks systems, which revealed Defendant's
18 immigration and criminal history. It was discovered that Defendant was a parolee at large.
19 Consequently, on August 28, 2007, Defendant was referred to the custody of Parole Agent Christine
20 Miller of the California State Parole for violation of parole.

21 On November 13, 2007, at approximately 8:10 a.m., Defendant was referred to the custody of
22 Immigration and Customs Enforcement. Deportation Officer Gregory Harrison reviewed Defendant's
23 immigration record, which revealed that Defendant had been previously deported from the United
24 States to Mexico on at least nine occasions. At approximately 10:47 a.m., Defendant was advised of
25 his Miranda rights and invoked his right to remain silent.

26 B. DEFENDANT'S IMMIGRATION HISTORY

27 Defendant is a citizen of Mexico who was ordered deported by an Immigration Judge on
28 August 6, 2002, March 7, 2005 and January 19, 2006. Defendant was physically removed from the

1 United States on several occasions, including September 17, 2001, August 6, 2002, February 10, 2003,
2 May 20, 2003, March 7, 2005, and January 23, 2006.

3 III

4 ARGUMENT

5 A. Motion to Compel Discovery

6 The United States has and will continue to fully comply with its discovery obligations. To
7 date, the United States has produced 166 pages of discovery and a DVD copy of Defendant's post-
8 arrest statements and the audiotape of Defendant's deportation hearing. Additionally, on February 12
9 and February 14, 2008, the United States provided defense counsel with the opportunity to view
10 Defendant's A-file. However, defense counsel had to cancel both appointments. An A-file viewing
11 is currently scheduled for March 6, 2008. As of today, the United States has received no reciprocal
12 discovery. Counsel believes that all discovery disputes can be resolved amicably and informally in this
13 case. In view of the below-stated position of the United States concerning discovery, it is respectfully
14 requested that no orders compelling specific discovery by the United States be made at this time.

15 1. Brady Information

16 The United States is well aware of and will continue to perform its duty under Brady v.
17 Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory
18 evidence within its possession that is material to the issue of guilt or punishment. Defendant, however,
19 is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused,
20 or which pertains to the credibility of the United States' case. As stated in United States v. Gardner,
21 611 F.2d 770 (9th Cir. 1980), it must be noted that "the prosecution does not have a constitutional duty
22 to disclose every bit of information that might affect the jury's decision; it need only disclose
23 information favorable to the defense that meets the appropriate standard of materiality." Id. at 774-775
24 (citation omitted).

25 The United States will turn over evidence within its possession which could be used to properly
26 impeach a witness who has been called to testify.

27 Although the United States will provide conviction records, if any, which could be used to
28 impeach a witness, the United States is under no obligation to turn over the criminal records of all

1 witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such
2 information, disclosure need only extend to witnesses the United States intends to call in its case-in-
3 chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d
4 1305, 1309 (9th Cir. 1979).

5 Finally, the United States will continue to comply with its obligations pursuant to United States
6 v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

7 2. Any Proposed 404(b) Evidence

8 The United States will disclose, in advance of trial, the general nature of any “other bad acts”
9 evidence that the United States intends to introduce at trial pursuant to Federal Rule of Evidence
10 404(b).

11 3. Request for Preservation of Evidence

12 The United States will preserve all evidence to which the Defendants are entitled pursuant to
13 the relevant discovery rules.

14 4. Defendant’s Statements

15 The United States recognizes its obligation under Federal Rules of Criminal Procedure
16 (“Rules”) 16(a)(1)(A) and 16(a)(1)(B) to provide to Defendant any written statements and the
17 substance of Defendant’s oral statements. The United States has produced all of Defendant’s
18 statements, that are known to the undersigned Assistant U.S. Attorney at this time. If the United States
19 discovers additional oral or written statements that require disclosure under the relevant Rules, such
20 statements will be promptly provided to Defendant.

21 The United States has already provided defense counsel with a DVD copy of Defendant’s post-
22 arrest interview.

23 The United States has no objection to the preservation of the handwritten notes taken by any
24 of the Government’s agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir.
25 1976) (agents must preserve their original notes of interviews of an accused or prospective government
26 witnesses). However, the United States objects to providing Defendant with a copy of any rough notes
27 at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes where the content of those
28 notes have been accurately reflected in a type-written report. See United States v. Brown, 303 F.3d

582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require disclosure of an agent's notes even where there are "minor discrepancies" between the notes and a report). The Government is not required to produce rough notes pursuant to the Jencks Act, because the notes do not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where notes were scattered and all the information contained in the notes was available in other forms). The notes are not Brady material because the notes do not present any material exculpatory information, or any evidence favorable to Defendant that is material to guilt or punishment. Brown, 303 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to the defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient). If, during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks Act, or Brady, the notes in question will be provided to Defendant

5. Tangible Objects

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The United States, however, need not produce rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

6. Expert Witness

The United States will comply with Rule 16(a)(1)(G) and provide Defendant with a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Federal Rules of Evidence 702, 703 or 705.

1 7. Witness Addresses

2 The United States objects to this request as overbroad, unnecessary, and unsupported. Through
3 discovery, Defendant has the names of the officers and agents involved in her arrest. In addition, the
4 United States will provided Defendant with a list of witnesses it intends to call in its trial
5 memorandum. The United States objects to the request for the name and address of witnesses who will
6 not be called by the Government at trial as overbroad and irrelevant.

7 8. Jencks Act Material

8 The United States will comply with its discovery obligations under the Jencks Act, Title 18,
9 United States Code, Section 3500, and as incorporated in Rule 26.2.

10 9. Informants and Cooperating Witnesses

11 At this time, the United States is not aware of any confidential informants or cooperating
12 witnesses involved in this case. The Government must generally disclose the identity of informants
13 where (1) the informant is a material witness, or (2) the informant's testimony is crucial to the defense.
14 Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this
15 case, the Court may, in some circumstances, be required to conduct an in-chambers inspection to
16 determine whether disclosure of the informant's identity is required under Roviaro. See United States
17 v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines there is a
18 confidential informant somehow involved in this case, the United States will either disclose the identity
19 of the informant or submit the informant's identity to the Court for an in-chambers inspection.

20 10. Specific Request

21 On February 6, 2008, the Government invited defense counsel to view Defendant's A-file. On
22 February 12, 2008 and February 14, 2008, the United States provided defense counsel with the
23 opportunity to view Defendant's A-file. However, defense counsel had to cancel both appointments.
24 An A-file viewing is currently scheduled for March 6, 2008.

25 11. Residual Request

26 The United States has complied with Defendant's residual request for prompt compliance with
27 Defendant's discovery requests and will continue to do so.
28

1 **B. Motion for Leave to File Further Motions**

2 The Government opposes this request unless the motion is based upon newly discovered
3 evidence not available to Defendant at the time of the motion hearing.

4 **IV**

5 **CONCLUSION**

6 For the foregoing reasons, the United States requests that Defendant's Motions be denied
7 where opposed.

8
9 DATED: February 29, 2008

10 Respectfully Submitted,

11 KAREN P. HEWITT
12 United States Attorney

13 /s/ Luella M. Caldito

14 LUELLA M. CALDITO
15 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOEL JIMENEZ-POLANCO,

Defendant.

Case No.08CR0016-DMS

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, LUELLA M. CALDITO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of:

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS TO (1) COMPEL DISCOVERY AND PRESERVE EVIDENCE; AND (3) GRANT LEAVE TO FILE FURTHER MOTIONS

on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Zandra Lopez

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case: None.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 29, 2008.

/s/ Luella M. Caldito
LUELLA M. CALDITO